Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1869

S & M MATERIALS COMPANY,

Petitioner,

VS.

SOUTHERN STONE COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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The Petitioner, S & M MATERIALS COMPANY, respectfully prays a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 21, 1980, with an Order denying petition for rehearing being entered on March 25, 1980.

CITATIONS TO OPINIONS BELOW

The Opinion of the Judge of the United States District Court granting summary judgment in favor of the seller, SOUTHERN STONE COMPANY, INC., was unreported,

but is attached herein as Appendix "A". The Opinion of the Fifth Circuit Court of Appeals printed in Appendix "B" hereto, is reported at 612 F2d 198. The final judgment and mandate of the United States Court of Appeals for the Fifth Circuit was issued on April 3, 1980.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, affirming the grant of summary judgment by the District Court and denying a petition for rehearing, is printed herein as Appendix "A". The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED FOR REVIEW

Is it an absolute requirement in order to qualify as interstate commerce under the Robinson-Patman Act that physical movement of the relevant product across a State line must occur? Or, is it sufficient that the "transaction" crosses the State line as this Court holds in *Gulf Oil Corp. vs. Copp Paving,* 419 U.S. 186, 95 S. Ct. 392?

In determining whether a transaction is in interstate commerce under the Robinson-Patman Act, the Fifth Circuit now holds that physical movement of the relevant product across a State line is an absolute, one hundred percent requirement. Is this so since this is not consistent with this Court's holding in *Gulf Oil Corp. vs. Copp Paving,* supra, which ironically is cited by the Fifth Circuit for holding that it is a mandatory requirement?

STATEMENT OF THE CASE

Petitioner-Appellant, S & M MATERIALS COMPANY, hereinafter referred to as S & M MATERIALS, filed suit against SOUTHERN STONE COMPANY, alleging violations of the anti-trust laws and specifically the Clayton Act, Section 13(a), as amended by the Robinson-Patman Act, Section 2(a).

On May 4, 1979, the United States District Court for the Middle District of Georgia, Columbus Division, granted SOUTHERN STONE's Motion for Summary Judgment, finding a lack of subject matter jurisdiction and a memorandum decision was issued by the Court. That memorandum decision states in pertinent part:

> "It thus appears that there was no sales by the Defendant company which were interstate sales as contemplated by the Robinson-Patman Act."

S & M MATERIALS appealed the dismissal of the cause maintaining there was sufficient evidence in the record of discriminatory interstate sales as that term as contemplated by the Robinson-Patman Act. Other issues were also involved in the appeal but they are not relevant to the instant petition.

The Decision on that appeal was rendered on February 21, 1980, with the United States Court of Appeals for the Fifth Circuit affirming the action of the District Court. That decision is attached hereto as Appendix "B" and states in pertinent part:

> "However anachronistic it may today seem, the cases established that the state of being 'in commerce' under Section 2(a) requires physical movement of the relevant product across a state line."

It is this statement with which S & M MATERIALS takes issue. It is this statement which is the subject of this petition and it is this statement which is not consistent with prior decisions of this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case involves questions of gravity and importance. This case also involves principles the settlement of which is of importance to the general public, farmers and every business entity which conducts business affairs in more than one state.

This case involves conflicts between decisions involving the question of interstate commerce and anti-trust.

This case involves the question of what is required of a business transaction to cause it to be classified as an interstate transaction. It is an absolute, one hundred percent requirement that physical movement of the relevant product across a State line is a must?

This case involves the interpretation of anti-trust legislation. The Courts have repeatedly interpreted that legislation to require that for a cause of action to arise under the Federal anti-trust legislation, and specifically the Robinson-Patman Act, at least one of the transactions involved must be in interstate commerce. The Fifth Circuit has now held that the

commodity involved itself must literally cross state lines. That additional requirement is not supported by any precedent. The effect of that additional requirement is to eliminate from the grasp of anti-trust legislation those organizations which admittedly transact interstate business but cleverly cause the delivery of the commodities involved to be done within their own State, and never outside.

This case involves the question of the scope of the protection afforded by Federal anti-trust legislation.

The decision in the instant case is contrary to the decision of this Court in *Gulf Oil Corporation vs. Copp Paving,* 419 U.S. 186, 95 Supreme Court 392.

The opinion of the Court of Appeals for the Fifth Circuit which has given rise to this petition contains the following excerpt:

> "At the time summary judgment was entered for Appellee, Appellant was unable, despite sixteen months of discovery, to point to a single interstate sale of dolemite rock by Appellee. Although Appellee has sold dolemite rock to foreign buyers . . . ."

The Court continued with the statement which serves as the crux of this petition, namely:

> "However, anachronistic it may today seem, the cases establish that the state of being 'in commerce' under Section 2(a) requires physical movement of the relevant product across a state line."

Anachronistic indeed, the principle is also contrary to this Court's decision in *Gulf Oil Corporation vs. Copp Paving*, 419 U.S. 186.

The Fifth Circuit's decision in the instant case is the first case ever to hold that "Section 2(a) requires physical movement of the relevant product across a state line." That requirement is contrary to this Court's opinion on the same issue, which is:

> "With almost perfect consistency, the Courts of Appeals have read the language requiring that 'either or any of the purchases involved in such discrimination [be] in commerce' to mean that Section 2(a) applies only where 'at least one of the two *transactions* which, when compared, generate a discrimination . . . . . cross[es] a State line.' " *Copp Paving*, 95 Supreme Court 401.

No mention at all is made with regard to a relevant product crossing a State line. The *Copp Paving* case cannot reasonably stand for that proposition, yet, that is the first case cited by the Court of Appeals for the Fifth Circuit to support its unique principle of law.

There are enumerable businesses throughout the nation conducting business across State lines on a daily basis but whose commodity does not cross a State line. They send their agents across a State line and they utilize the telephone and mail service. They bank across State lines and they solicit business across State lines. This Court has held in *Copp Paving* that it is the "transaction" which must cross the State line so as to

satisfy that interstate commerce requirement of the Robinson-Patman Act, Section 2(a).

Now, the United States Court of Appeals for the Fifth Circuit has rewritten that rule. It is no longer, according to that Court, the rule that the transaction must cross the State line, the rule now is that the relevant commodity must be literally picked up and carried across a State line.

With this new and narrow rule, thousands of business transactions which Congrsss intended to be subjected to the protection of the Robinson-Patman Act, and which, up until February 20, 1980, had been subject to that Act, can now participate in precisely the same practices which the Act attempts to prohibit. Now, those once regulated transactions can simply hide behind the shroud of in-state deliveries.

Thousands of small business will no longer be afforded the protection of the Act once provided them, even if a discriminatory business reeks with characteristics of interstate commerce. Now, business may participate in discriminatory practices knowing that as long as their product does not cross a State line, the victim of the discrimination has no recourse, even if every other aspect of their transactions are interstate in nature.

CONCLUSION AND PRAYER

The question presented herein has broad significance to any and every citizen who conducts business.

Congress intended to protect those transactions and businesses from discriminating practices with regard to pricing and this Court has interpreted the law in that area as to require that one of the transactions involved in the discrimination cross a State line. The United States Court of Appeals for the Fifth Circuit has now ruled in the instant case that a narrower requirement applies. Now, the commodity itself must cross a State Line. The two requirements are not consistent.

For these and the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,
GOWER and GUNBY, P.C.

BY: _____

Charles A. Gower, Attorney
for S & M Materials

BY: _____

Stephen G. Gunby, Attorney
for S & M Materials

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PROOF OF SERVICE

The undersigned attorney of record for Petitioner, CHARLES A. GOWER, hereby certifies as follows:

(a) That I, CHARLES A. GOWER, am a member of the Bar of the United States Supreme Court, and that I have duly served all parties with the foregoing Petition for Writ of Certiorari as hereinafter shown:

(b) That the names and addresses of the attorney of record for the adverse party is as follows:

Mr. William B. Hardegree
Hatcher, Stubbs, Land, Hollis
and Rothschild
Attorneys at Law
P. O. Box 2707
Columbus, Georgia 31902

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the same William B. Hardegree, attorney for the Respondent, by depositing same in the United States mail, return receipt requested, properly addressed to said attorney for Respondent at his said address.

EXECUTED, this the 30th day of April, 1980.

Charles A. Gower
Gower and Gunby, P.C.
Attorneys at Law
P. O. Box 2148
Columbus, Georgia 31902
404/324-5685

Sworn to and subscribed before
me this 30th day of April, 1980.

/s/ Carolyn Miller

Notary Public, Muscogee County, Georgia
My Commission expires March 13, 1983.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 77-176-COL

S & M MATERIALS COMPANY,

Plaintiff

v.

SOUTHERN STONE COMPANY, INC.,

Defendant

MEMORANDUM AND ORDER ON MOTION
FOR SUMMARY JUDGMENT

This is an action brought under the provisions of the Robinson-Patman Act in which the Plaintiff contends that it has been damaged in that it alleges that the Defendant has made sales of limestone at prices which discriminate against the Plaintiff. The Defendant has filed a motion for summary judgment and the threshold question presented is one of subject matter jurisdiction.

Under the Robinson-Patman Act there must be two sales, one of which is across a state line. All of the discovery which has been completed in connection with this matter makes it clear that the Defendant company is an Alabama operation which did all of its work, mining and selling, in the State of

Alabama. It made all of its deliveries at its plant in Auburn, Alabama either to the customer himself or to common carrier designated by the customer to accept dominion of the goods at the time of delivery at the plant. It thus appears that there were no sales by the Defendant company which were interstate sales as contemplated by the Robinson-Patman Act. Furthermore, numerous decisions which have interpreted the Act have established that the sales which were alleged to be discriminatory must be sales made to competitors. The Plaintiff company operates a hammer mill and crushes limestone into agricultural lime which is used for farming purposes. The discriminatory sale to which the Plaintiff refers was a sale allegedly made by the Defendant to a company which is engaged in the ready-mix concrete business. It is thus apparent that these two companies were not competitors. It is further clearly indicated from the discovery material that the concrete company actually bought the stone from the Defendant company for the purpose of delivering it to the Plaintiff as an accomodation to the Plaintiff, so, instead of being a competitor, the purchaser was actually assisting the Plaintiff.

The Court concludes that subject matter jurisdiction is lacking and that the Defendant's motion for summary judgment should be sustained. The motion is sustained and the Plaintiff's complaint is dismissed.

IT IS SO ORDERED this 4th day of May, 1979.

J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 77-176-COL.

S & M MATERIALS COMPANY

V.

SOUTHERN STONE COMPANY, INC.

JUDGMENT

Pursuant to the Court's Memorandum and Order on Motion for Summary Judgment filed May 4, 1979, and for the reason contained therein, Defendant's motion for Summary Judgment is sustained.

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE DEFENDANT.

This 4th day of May, 1979.

WALTER F. DOYLE, CLERK

BY /s/ Jonnie L. Adams

Jonnie L. Adams
Deputy Clerk

APPENDIX "B"

S & M MATERIALS COMPANY,
Plaintiff-Appellant,

v.

SOUTHERN STONE COMPANY, INC.,
Defendant-Appellee.

No. 79-2336

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1980.

Appeal from the United States District Court
for the Middle District of Georgia

Before BROWN, HILL and RANDALL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Southern Stone Co., appellee, owns and operates a dolemite rock quarry in Auburn, Alabama. High transportation costs and the bulky product's low value combine to give appellee a natural monopoly over the supply of raw dolemite rock in the Auburn area. S & M Materials Co., appellant, began life as a wholesaler of agricultural lime, which is derived from dolemite rock. In 1975, appellant decided to integrate backwards, and build a facility in Seale, Alabama for processing dolemite rock into agricultural lime. The decision to locate at Seale - within appellee's natural monopoly area - assumed

that appellee would be a dependable supplier of dolemite rock, as it had theretofore been of agricultural lime. But when appellee learned that appellant was manufacturing agricultural lime and selling it as a horizontal competitor, appellee raised appellant's price - and appellant's price alone - for dolemite rock by slightly less than 50%. Appellant circumvented this action for a time by engaging one Bi-City Concrete Co. secretly to act as a broker, purchasing dolemite rock from appellee (at the normal price) and immediately reselling it to appellant. Appellee soon got wind of this scheme, however, and increased Bi-City's price too.

Claiming that appellee's selective price increases forced it out of business, appellant brought the instant suit under § 2(a) of the Robinson-Patman Act. 15 U.S.C. §13(a)(1976).[1] Following sixteen months of opportunity for discovery, during which time appellee cooperatively responded to appellant's discovery requests, the trial court entered summary judgment for appellee on the ground, *inter alia,* that appellant had adduced no evidence of preferential sales "in commerce." We affirm.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13 (a) (1976), prohibits persons "engaged in commerce" from "discriminat[ing] in price between different purchasers

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1. Appellant has seen fit to proceed solely under the Robinson-Patman Act, and does not assert a cause of action under § 2 of the Sherman Act. 15 U.S.C. § 2 (1976). The scope of our decision is, of course, similarly so limited.

of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce," and "where the effect of such discrimination may be substantially to lessen competition or trend to create a monopoly in any line of commerce." The jurisdictional reach of this statute is far less than the commerce clause would allow. In contrast with the Sherman Act, by which Congress exercised "the utmost extent of its Constitutional power in restraining trust and monopoly agreements," *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558, 64 S.Ct. 1162, 1176, 88 L.Ed. 1440 (1944); *see Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 & n.2, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), "the distinct 'in commerce' language of the Clayton and Robinson-Patman Act[s] . . . denote[s] only persons or activities within the flow of interstate commerce - the practical, economic continuity in the generation of goods and services for interstate markets . . .." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S.Ct. 392, 398 42 L.Ed.2d 378 (1974). *Accord, United States v. American Building Maintenance Industries*, 422 U.S. 271, 276, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975). The "in commerce" requirement, moreover, delimits both the universe of "persons" who are subject to the Act and the type of transactions that can constitute a violation thereof. Not the alleged violator, merely, but the discrimination sought to be charged must also involve a transaction "in commerce."

In the instant case, appellee clearly is "engaged in commerce" within the meaning of § 2(a). Appellee regularly accepts orders for agricultural lime from Georgia customers, and loads it onto trucks bound for that state. It is of no moment that the terms of such shipments are free on board appellee's quarry, or that title to the goods may pass in Alabama. The obviously interstate character of appellee's Georgia lime sales cannot be so easily transformed.

But the foregoing conclusion does not end our inquiry, because appellant's antitrust claim does not relate to agricultural lime. The discrimination for which appellant sues involves the quiet different product of dolemite rock, from which lime is made. Section 2(a) applies only to discrimination in price among "commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce." Thus, not withstanding that appellee is itself "engaged in commerce," jurisdiction under the statute depends additionally on the existence of a sale "in commerce" of dolemite rock or a commercially fungible product, *cf. Fred Meyer, Inc. v. FTC,* 359 F.2d 351, 359 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), with which appellee's sales to appellant can be compared. And it is here that appellant's case falls down.

At the time summary judgment was entered for appellee, appellant was unable, despite sixteen months of discovery, to point to a single interstate sale of dolemite rock by appellee.

Although appellee has sold dolemite rock to foreign buyers - appellant itself is a Georgia corporation - the domicile of the purchaser is not controlling. However anachronistic it may today seem, the cases established that the state of being "in commerce" under § 2(a) requires physical movement of the relevant product across a state line. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974), quoting *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied,* 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1144 (5th Cir.) (en banc), *cert denied,* 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208-10 (5th Cir. 1969). So far as the record shows, appellee has never shipped a single dolemite rock, either directly or indirectly, out of the state of Alabama. We think that appellant had ample opportunity to discover the existence, if any, of preferential dolemite rock sales "in commerce," and its failure to do so warranted the entry of summary judgment on appellant's Robinson-Patman claim.

AFFIRMED.